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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 98.

ARIZONA GROCERY COMPANY, *Petitioner,*
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., *Respondents.*

ARIZONA GROCERY COMPANY, *Petitioner,*
vs.
SOUTHERN PACIFIC COMPANY ET AL., *Respondents.*

Application by the Arizona Corporation Commission for Leave to File a Brief Amicus Curiae, and Accompanying Brief in Support of the Petition for a Writ of Certiorari.

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INDEX.

	Page
APPLICATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE	1
BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI	3
Statement of the Interest of the Arizona Corporation Commission	3
Statement of Facts	4
The Court Should Grant the Writ	6
Opposite Construction of the Law by the Court of Appeals of the Fifth Circuit	14
Under the Interstate Commerce Act the Commission Had Jurisdiction to Make the Award	15

TABLE OF CASES CITED.

Consolidated Southwestern Cases, 123 I. C. C. 203	12
Eagle Cotton Oil Co. v. Southern Ry. Co. (decided July 21, 1931; not yet reported)	14, 21
Eastern Class Rate Investigation, 164 I. C. C. 314	12
Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184	20
Phoenix Chamber of Commerce et al. v. Director General, 62 I. C. C. 412	4
Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Ry. Co., 95 I. C. C. 244	5
Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Ry. Co., 140 I. C. C. 171.	5

Page

Rate Structure Investigation, Part 2, Western Trunk-Line Class Rates, 164 I. C. C. 1....10, 12

Rate Structure Investigation, Part 3, Cotton, 165 I. C. C. 595 10

Rate Structure Investigation, Part 4, Petroleum and Petroleum Products, 171 I. C. C. 286... 10

Rate Structure Investigation, Part 4-A, Rates on Refined Petroleum Products From, To and Between Points in the Southwest, 171 I. C. C. 381 10

Rate Structure Investigation, Part 5, Furniture, 177 I. C. C. 5 10

Rate Structure Investigation, Part 6, Iron and Steel Articles, 155 I. C. C. 517..... 10

Rate Structure Investigation, Part 7, Grain and Grain Products Within the Western District and for Export, 164 I. C. C. 619..... 10

Rate Structure Investigation, Part 9, Livestock-Western District, 176 I. C. C. 1..... 10

Rate Structure Investigation, Part 9, Livestock-Southern Territory, 171 I. C. C. 721..... 11

Rate Structure Investigation, Part 11, Sand and Gravel, 155 I. C. C. 247 11

Rate Structure Investigation, Part 11-A, Sand and Gravel From Kansas and Missouri (decided July 7, 1931; not reported)..... 11

Reduced Rates, 1922, 68 I. C. C. 676.....4, 12

Southern Class Rate Case, 100 I. C. C. 513..... 12

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.....19, 20

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Application by the Arizona Corporation Commission for Leave to File a Brief Amicus Curiae in Support of the Petition for a Writ of Certiorari.

The Arizona Corporation Commission respectfully asks leave of the court to file a brief *amicus curiae* in support of the petition for a writ of certiorari in

the above entitled proceeding. The interest of said Commission in said proceeding is set forth in the brief which it asks leave to file, which brief is hereto attached.

ARIZONA CORPORATION COMMISSION,
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Brief of Arizona Corporation Commission in Support of the Petition for a Writ of Certiorari in the Above Entitled Proceeding.

STATEMENT OF THE INTEREST OF THE ARIZONA CORPORATION COMMISSION.

The Arizona Corporation Commission is a regulatory commission, established by the Constitution of the State of Arizona, having jurisdiction over the intrastate rates and services of common carriers by railroad within said state. Under the law of Arizona it is also the duty of said Commission, whenever, in the exercise of its discretion, it shall deem it expedient so to do, to represent the interests of interstate shippers generally in the State of Arizona, in any

proceeding wherein are involved the rights of said shippers in the matter of such railroad rates as are subject to the jurisdiction of the Interstate Commerce Commission.

Section 16 (1) of the Interstate Commerce Act confers jurisdiction upon the Interstate Commerce Commission to make awards of reparation to shippers in cases wherein, after hearing, the Commission finds that unjust and unreasonable rates have been exacted from them. The decision rendered in the above entitled proceeding in the court below, if the same shall be sustained, will operate in effect as a repeal of that statutory provision. Because that provision is a valuable safeguard to interstate shippers of the state of Arizona against the imposition of unreasonable rates, and because its destruction would be a very great injury to such shippers and to said State, the Arizona Corporation Commission believes that it should file in this court a brief pointing out the grounds upon which the judgment of the court below should be set aside.

STATEMENT OF FACTS.

On June 22, 1921, in *Phoenix Chamber of Commerce et al. v. Director General,* 62 I. C. C. 412, the Interstate Commerce Commission found that rates on sugar from California points to Phoenix, Arizona, would in the future be unreasonable to the extent that they exceeded 96.5 cents. An order was made requiring the carriers to establish rates not exceeding that level. They established a rate of 96 cents.

On May 16, 1922, in *Reduced Rates, 1922,* 68 I. C. C. 676, the Commission found the rates then existing to be unjust and unreasonable on and after July 1,

1922, unless reduced 10 per cent. The carriers, on January 10, 1924, thereupon reduced the rates on sugar from California points to Phoenix to 84 cents.

On January 6, 1925, in *Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Co.*, 95 I. C. C. 244, the Commission found that the rate from California points to Phoenix would for the future be unreasonable to the extent that it should exceed 71 cents per 100 pounds, and made an order accordingly. A rate of 71 cents was thereupon established by the carriers, effective February 25, 1925.

On March 12, 1928, in *Phoenix Chamber of Commerce et al. v. Atchison, Topeka & Santa Fe Railway Co.*, 140 I. C. C. 171, the Commission found that the rate on sugar from Southern California points to Phoenix prior to July 1, 1922, was unjust and unreasonable to the extent that it exceeded 79 cents, and that the like rate from Northern California points to Phoenix was unreasonable to the extent that it exceeded 81 cents prior to July 1, 1922, and that those rates were unreasonable subsequently to July 1, 1922, to the extent that they exceeded 71 cents and 73 cents, respectively. An order was made which awarded reparation upon shipments which moved subsequently to July 1, 1922, and prior to the taking effect of the 71-cent rate required by the Commission's decision of January 6, 1925. Some of these shipments, upon which reparation was awarded, moved under the 96-cent rate and some the 84-cent rate.

Actions to recover the reparation awarded were brought in the United States District Court for the District of Arizona. These were submitted to the court on agreed statements of fact (Record 254-319). Judgments were rendered in favor of the Arizona

Grocery Company (Record 228). Upon appeal the United States Circuit Court for the Ninth Circuit reversed the District Court. The petition for certiorari in this proceeding was filed to review that judgment.

The opinion of the Circuit Court is reported 49 Fed. Rep. (2d) 563. The decision of the court is based upon the proposition that when the Interstate Commerce Commission has once found and by order established a maximum rate level, and carriers have established rates which do not exceed that level, neither the Commission nor any court can find such rates unreasonable, and make any award of reparation thereon.

The issue to be determined is whether rates exacted by a carrier which conform to a tariff not violative of an outstanding order of the Interstate Commerce Commission prescribing a maximum rate level are conclusively presumed to be lawful, or may be attacked in reparation proceedings, and made the basis of a reparation award, if in fact unreasonable.

THE COURT SHOULD GRANT THE WRIT.

The issuance of the writ prayed for is asked upon various grounds. We shall discuss but one, which in the petition is stated as follows:

> "1. The matter of the right and power of the Interstate Commerce Commission to award reparation to a shipper when it finds that such shipper has paid rates which were unreasonable, whether such rates were equal to or less than a previously approved maximum rate, involves an important question of federal law which has not

been, but should be, settled by this Honorable Court."

It is admitted by the respondents, at page 21 of their brief filed herein, "that the instant proceeding involves an important question of federal law." They say, however, "But it does not necessarily follow that this Court is required to review the Circuit Court's decision." The respondents urge that the question involved has been settled, "indirectly at least"; and cases in support of that contention are cited. We believe, however, that an examination of those cases will show that the question at issue herein has never been considered, or settled in principle by this court.

We accordingly proceed to discuss briefly the supreme importance of the question involved, which should lead this court to issue the writ prayed for, to the end that it may review the judgment below and authoritatively settle the question of law involved.

Upon the decision of that question will depend whether the Interstate Commerce Commission will hereafter exercise the power to award reparation for damages caused by the exaction of unreasonable rates. If the decision of the court below shall be permitted to stand, and shall be followed by the Commission and by the lower federal courts, the rule therein laid down will shortly operate to all intents and purposes as a repeal of the reparation provisions of the Interstat Commerce Act.

The court below held that the order of the Commission "fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable

and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established and that the order of the Commission amounted to a decision that rates fixed by the carrier below the maximum it had established were just and reasonable."

The court also held that the Commission is without jurisdiction to award reparation for the exaction of rates published in a tariff which was in conformity with an outstanding order of the Commission. Upon this point the court said:

> "The contention is that the Commission could revise its original findings as to what was in fact a reasonable rate because in the first instance it acted as a law-making body—a legislature—and in the second it acted in a judicial capacity—as a court. * * * What follows? Is it not true that a court is bound in its determination by the law? Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (sec. 16, subd. 1), delegating power to the Commission to award reparations, limits that power to parties 'entitled to an award of damages under the provisions of this chapter (act) for a violation thereof. * * *'. (See, also, Transportation Act, sec. 10, subd. 8.) Is the court (the Commission in its quasi-judicial capacity) to say that a carrier has no lawful right to collect a rate established by law (that fixed by the Commission acting in its quasi-legislative capacity), or, having collected it, to retain it? It is true that the original order is not res judicata, but its effect

is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the legislature." (R., 451-452.)

"When, however, in regularly pursuing its delegated power, the Commission establishes a specific rate as reasonable in fact, the legislative power has so definitely established the specific rate thus fixed as just and reasonable that there is no longer room for judicial decision as to what is a just and reasonable rate. Congress, through its agent, the Commission, has established the measure by which the reasonableness of the rate is to be judged. In considering an application for damages for charging unreasonable rates a court, or the Commission acting as such, must confine its inquiry to the other factors involved in an award of reparations, such as the amount of freight moved, the point of origin and of delivery, the owner of the shipment, etc.; but if there is no excess charge there can be no award, for where the rate is one fixed by law it is not excessive in any legal sense." (R., 453-454.)

If this decision of the Circuit Court of Appeals is sound, then in large part the rates now in effect throughout the United States are beyond attack in reparation proceedings, no matter how unreasonable they may be in fact: and it will not be long before the same will be true of all rates.

The Interstate Commerce Commission is under a mandate from Congress, contained in the Hoch-Smith Resolution (43 Stat. L. 801), by which it is required to investigate rates of all carriers subject to the Interstate Commerce Act, "from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates

upon designated classes of traffic upon a just and reasonable basis with relation to other rates."

The Commission is proceeding to perform the duty laid upon it by this resolution in one comprehensive investigation which involves all rates of all railroads in every part of the United States. For purposes of convenience this investigation has been divided into various parts, or cases, some of which have been concluded, while the others are still in progress. Orders have already been made, as follows:

No. 17,000, *Rate Structure Investigation,* Part 2, *Western Trunk-Line Class Rates,* 164 I. C. C. 1.

No. 17,000, *Rate Structure Investigation,* Part 3, *Cotton,* 165 I. C. C. 595.

No. 17,000, *Rate Structure Investigation,* Part 4, *Petroleum and Petroleum Products,* 171 I. C. C. 286.

No. 17,000, *Rate Structure Investigation,* Part 4-A, *Rates on Refined Petroleum Products From, to and Between Points in the Southwest,* 171 I. C. C. 381.

No. 17,000, *Rate Structure Investigation,* Part 5, *Furniture,* 177 I. C. C. 5.

No. 17,000, *Rate Structure Investigation,* Part 6, *Iron and Steel Articles,* 155 I. C. C. 517.

No. 17,000, *Rate Structure Investigation,* Part 7, *Grain and Grain Products Within the Western District and for Export,* 164 I. C. C. 619.

No. 17,000, *Rate Structure Investigation,* Part 9, *Livestock-Western District Rates,* 176 I. C. C. 1.

No. 17,000, *Rate Structure Investigation,* Part 9, *Livestock-Southern Territory Rates,* 171 I. C. C. 721.

No. 17,000, *Rate Structure Investigation,* Part 11, *Sand and Gravel,* 155 I. C. C. 247.

No. 17,000, *Rate Structure Investigation,* Part 11-A, *Sand and Gravel From Kansas and Missouri* (decided July 7, 1931; not yet reported).

In each of these cases the Commission has exercised its power only to the extent of fixing maximum rate levels. In due time the Commission will make other orders until it will have dealt with all the rates of carriers covering every class of traffic in every portion of the United States. Each of these orders involves large classes of traffic over broad areas. It has been and will be manifestly impossible for the Commission to consider the facts surrounding each particular rate in such manner as to enable all rates to be placed upon just and reasonable bases. It is obvious that in such proceedings the Commission can consider only general rate levels.

When the carriers shall have filed tariffs conforming to the orders made and to be made in *Rate Structure Investigation,* under the Hoch-Smith Resolution, if the decision of the court below is sound, neither the Commission nor any court will thereafter have any jurisdiction to consider the reasonableness of particular rates, but, so long as the law shall remain unchanged, and the Commission's orders shall remain unrevoked, all rates whatsoever published in such tariffs will, as a matter of law, be conclusively presumed to be reasonable in any proceeding brought to

recover reparation for excessive charges, notwithstanding any unreasonableness in fact.

This same situation would have come about in the ordinary course of the Commission's administration of the Interstate Commerce Act, if the Hoch-Smith Resolution had not been adopted. For example, in a series of cases the Interstate Commerce Commission has established maximum levels of reasonable rates for all freight moving under class rates, throughout the United States east of the Rocky Mountains. These cases were *The Southern Class Rate Case,* 100 I. C. C. 513; *Eastern Class Rate Investigation,* 164 I. C. C. 314; *Consolidated Southwestern Cases,* 123 I. C. C. 203; and *Western Trunk-Line Class Rates,* 164 I. C. C. 314, above cited. All of these cases except the last were instituted before the Hoch-Smith Resolution was adopted. In each of them the Commission dealt with rates by establishing a maximum rate level.

Great numbers of other cases might be cited. Reference will be made, however, only to *Reduced Rates, 1922,* 68 I. C. C. 676, 734, 736. In that case the Commission dealt with all freight rates of every kind in the United States, and announced its decision as follows:

> "After considering all the facts of record, including the necessity of reasonable expenditures for additions and betterments, we find and determine: * * *
>
> "2. That the existing freight rates and charges, including charges for switching and other accessorial services and all other charges applicable to freight service which were increased by authority of *Increased Rates, 1920, supra,* will be on and after July 1, 1922, unjust and unreasonable to the

extent that they may respectively include more than the following percentages of increase over the rates in effect immediately prior to August 26, 1920, in and between the various rate groups as defined in *Increased Rates, 1920,* 58 I. C. C., 220, 489, and *Authority to Increase Rates,* ibid., 302:

"In the eastern group, also between points in Illinois territory and between Illinois territory and the eastern group, 26 per cent instead of the 40 per cent authorized in the decisions last cited.

"In the western group, and between the western group and Illinois territory, 21.5 per cent instead of the 35 per cent so authorized.

"In the southern and mountain-Pacific groups, 12.5 per cent instead of the 25 per cent so authorized.

"On interterritorial traffic, except as otherwise provided herein, 20 per cent instead of the 33⅓ per cent so authorized. * * *

"The respondents should advise us promptly, and not later than May 31, 1922, if possible, whether the findings herein will be carried into effect without formal order or orders by us."

In the several class rate cases orders have been made. In *Reduced Rates, 1922,* the carriers complied with the Commission's decision without a formal order. If an order in that case had been made, then in that single case, if the decision of the lower court is sound, the Commission would have completely ousted itself of all jurisdiction upon reparation claims, notwithstanding the manifest impossibility, in a case of such magnitude, of such consideration of particular rates as to assure the placing of such rates upon a just and reasonable basis.

Indeed, it may be argued that the decision of the

Commission announced in its report, in *Reduced Rates, 1922,* as to the maximum level, was the controlling fact; and that the carriers, by complying with that decision, without awaiting a formal order, did not place themselves in any less favorable position than they would have occupied had they awaited the order; and that hence the rates voluntarily established by the carriers in conformity with that decision, embracing practically all freight rates in the United States, are now in every instance reasonable in contemplation of law, and beyond question in reparation proceedings.

In any event, these cases just cited demonstrate that the Interstate Commerce Commission, if it has any jurisdiction yet remaining, is exercising a rapidly diminishing jurisdiction, as to awards of reparation, if the decision of the court below is a correct exposition of the law.

This suggestion is made to indicate the great importance of the question of law involved in this case, which renders it essential that this court shall settle that question conclusively by exercising its power to review the decision of the Circuit Court of Appeals herein.

THE OPPOSITE CONSTRUCTION OF THE LAW BY THE COURT OF APPEALS OF THE FIFTH CIRCUIT.

The necessity for a decision of this court to settle authoritatively the legal question involved is established by the opposite decision of that question by the Circuit Court of Appeals for the Fifth Circuit in *Eagle Cotton Oil Company vs. Southern Railway Company et al.;* rendered July 21, 1931 (not yet reported),

the opinion in which is printed in full in petitioner's supplemental brief herein.

UNDER THE INTERSTATE COMMERCE ACT THE COMMISSION HAD JURISDICTION TO MAKE THE AWARD.

The decision of the issue presented depends upon the construction of the Interstate Commerce Act, from which the following pertinent provisions are quoted:

> Section 1 (4) provides: "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish * * * just and reasonable fares, rates and charges applicable thereto * * *."
>
> Section 1(5) provides: "All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *."
>
> Section 8 provides: "That in case any common carrier * * * shall do * * * any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act * * *."

Section 9 provides: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction * * *."

Section 13(1) provides: "That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition * * *."

Section 16(1) provides: "That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

The Act, therefore, specifically makes it the duty of each carrier to establish just and reasonable rates, and prohibits and declares unlawful every unjust and unreasonable charge. It further grants to the Commission jurisdiction upon complaint to determine when any carrier has violated the Act; and to make an award for any damage caused any complainant by such violation.

The question for determination then is whether a carrier may exact rates in fact unreasonable without violating the Interstate Commerce Act, provided only that the rates exacted do not exceed a level fixed by order of the Interstate Commerce Commission as a maximum level. Otherwise stated, the question is, does the failure of the Interstate Commerce Commission to forbid a rate in fact unreasonable make it lawful for the carrier to exact that rate notwithstanding the prohibition contained in the Act.

The opinion of the court below holds that the prescription of a maximum rate level by the Commission is equivalent to a decision by the Commission that any rate upon or below that level is just and reasonable. The court therefore concludes that the exaction of such a rate can not be held unlawful, and made the basis for a reparation award.

This leaves out of account, however, the original plan of the Act, which has, in this respect, been continued to this time. As originally enacted, the Act to Regulate Commerce made it the duty of the carriers to conform their rates to the standard of reasonableness prescribed by the Act; and gave to anyone injured by any failure in that respect a remedy by complaint before the Commission, which was granted jurisdiction to determine and award damages. The Commission's jurisdiction has been greatly enlarged since the Act to Regulate Commerce was passed, but the carriers have never been relieved from the duty placed upon them by the common law, and reaffirmed in Section 1 of the Act, to keep their rates just and reasonable; and the Commission has never been relieved of its duty to hear and determine complaints

against carriers alleging damages resulting from failure to perform this duty.

There are two obvious reasons for this: The United States is so vast, the number of carriers is so great, and their rates so multitudinous, that it passes the human capacity of the men composing any tribunal to survey all the rates of the United States and to place all of them upon a just and reasonable basis. Hence when dealing with rates generally, the Commission can not know that any general rate order which it may make will operate to give to every individual shipper just and reasonable rates. Furthermore, conditions which affect the reasonableness of rates are not static. They change from time to time, so that rates which are just and reasonable at one time may at a later time be unjust and unreasonable. Hence the fact that a given rate conforms to an order of the Interstate Commerce Commission which is still outstanding does not afford any assurance that it is just and reasonable.

For these reasons the Congress, although it has successively enlarged the power of the Commission, giving it in 1906 jurisdiction to prescribe reasonable maximum rates (34 Stat. L. 589, Sec. 4), in 1920, in Transportation Act, 1920, whereby Section 15(1) was brought into its present form, the power to fix reasonable minimum rates, and in 1925, in the Hoch-Smith Resolution, directing it to survey all rates with the purpose in view of enforcing the standards prescribed by the Interstate Commerce Act, yet it has never relieved the Commission of its reparation jurisdiction or deprived shippers of their right to invoke that jurisdiction.

It therefore is the duty of each carrier to keep its

rates just and reasonable, in view of the conditions at any time existing. After rates have been established which are within the limits permitted by some order of the Commission, it is still the continuing duty of the carrier to keep familiar with changing conditions, and to adapt its rates to those conditions by necessary changes in its tariffs.

Nothing can better illustrate the necessity for continuing this duty on the part of the carriers, and for continuing also jurisdiction on the part of the Commission to enforce it by awards of damages, than the series of decisions in general rate cases, involving rate structures extending over great areas, which have been cited on this brief. The impossibility of considering particular rates in such proceedings is manifest. If shippers are not to be subjected to injury without redress some forum must be provided to them to which they may make complaint of unreasonable rate exactions, and from which they may procure awards compelling reimbursement for damages which they show.

It has heretofore been held by this Court that the provisions of the Interstate Commerce Act have operated to terminate the primary jurisdiction of the court; and that, as the law stands now, application for reparation must first be made to the Commission. *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426. The decision below, however, is based upon the theory that the law itself creates a conclusive presumption of reasonableness applicable to all rates fixed in tariffs conforming to the limitations of a maximum rate order of the Commission.

If this decision is sound, the individual shipper has, by operation of the very legislation which was designed for his benefit, been placed in a worse position than he occupied before the Act to Regulate Commerce was passed. Under the common law he could contest in court the legality of rates deemed by him unreasonable and could recover damages for illegal exactions from him. *Texas & Pac. Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426, 436. Now, he may not escape payment of the rate fixed by any tariff filed and in effect under the law, for, so far as he is concerned, the tariff itself has the same effect as a statute. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 197.

The shipper must, accordingly, pay the rate fixed in any lawfully published tariff, and, under the decision below, if that tariff conforms to an outstanding order of the Commission, he may not thereafter before any tribunal assert that it is unjust and unreasonable and ask reimbursement for damages caused him by the exaction from him of the rates fixed therein.

It therefore follows, if the decision below is sound, that the Commission in a general rate case may prescribe a maximum general rate level under which rates may take effect grossly unreasonable for particular shippers, by reason of particular circumstances which have never been considered by the Commission, and yet those who suffer from such rates will have no redress anywhere. They may, it is true, carry on litigation before the Commission to require their unreasonable rates to be changed; but the unreasonable payments exacted from them prior to application to the Commission, and during the years that

the litigation instituted before the Commission may be in progress, are irretrievably lost.

The decision of the court below that the Commission was without jurisdiction to make the award involved in this case rests upon no express provision of the Interstate Commerce Act or of any amendment thereto. If the Commission has been deprived of the jurisdiction which the Act once gave it to make awards requiring reimbursement of sums exacted through the imposition of unreasonable rates, such deprivation must arise from an implication inhering in some amendment to the Act; but neither in the language of any amendment, nor in anything connected with its legislative history, can there be found a basis for the conclusion that Congress by any such amendment has intended to subject rate payers to unreasonable exactions, through the imposition of rates never in fact considered by the Commission, without providing any means of redress whatsoever.

We cite the decision of the Circuit Court of Appeals of the 5th Circuit in *Eagle Cotton Oil Co. v. Southern Railway Co. et al.* (decided July 21, 1931; not yet reported), and in particular the concurring opinion of Judge Hutcheson therein.

Respectfully submitted,

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